



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**Office of Federal Operations**  
**P.O. Box 77960**  
**Washington, DC 20013**

[REDACTED]  
Otto D.,<sup>1</sup>  
Petitioner,

v.

Denis R. McDonough,  
Secretary,  
Department of Veterans Affairs,  
Agency.

Petition No. 2025001150

MSPB Nos. DE-0752-24-0419-I-1; DE-531D-24-0418-I-1

**DECISION**

Petitioner filed a petition with the Equal Employment Opportunity Commission (EEOC or Commission) seeking review of Final Orders issued by the Merit Systems Protection Board (MSPB or Board) concerning his claims of discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the reasons that follow, we DENY consideration of the petition.

**ISSUE PRESENTED**

Whether the Commission has jurisdiction to review Petitioner's petition.

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<sup>1</sup> This case has been randomly assigned a pseudonym which will replace Petitioner's name when the decision is published to non-parties and the Commission's website.

### BACKGROUND

At the time of events giving rise to this petition, Petitioner worked as a Human Resources (HR) Specialist, GS-0201-12, at the Agency's Rocky Mountain Network (Veterans Integrated Service Network 19) facility in Glendale, Colorado.

In April 2023, Associate HR Officer (AHRO) proposed Petitioner's removal, but this was later mitigated to a 12-day suspension. After Petitioner returned from his suspension, in July 2023, Petitioner's supervisor (S1), Supervisory HR Specialist, issued Petitioner a Notice of Opportunity to Improve to Demonstrate Acceptable Performance (Notice). In November 2023, based on Petitioner's most recent performance appraisal, S1 informed Petitioner that he did not successfully complete the Notice. The failure to complete the Notice caused Petitioner's within-grade increase (WIGI) to be withheld. Petitioner subsequently retired from his position, effective January 31, 2024.

On January 19, 2024, Petitioner filed an equal employment opportunity (EEO) complaint with the Agency (Agency No. 2003-10N19-2024-155727). The complaint alleged that the Agency subjected Petitioner to a hostile work environment in reprisal for prior protected EEO activity under Title VII and the ADEA when:

1. On October 26, 2023, AHRO denied Petitioner's request for reassignment to another position;
2. On November 30, 2023, Petitioner's second-level supervisor (S2), HR Chief, Recruitment & Placement, notified Petitioner that she would deny his WIGI; and
3. On January 31, 2024, Petitioner was forced to retire.

The Agency determined that claims 2 and 3 were appealable to the MSPB and adjudicated those claims as a mixed case complaint.<sup>2</sup>

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<sup>2</sup> A mixed case complaint is a complaint of employment discrimination filed with a federal agency related to or stemming from an action that can be appealed to the MSPB. 29 C.F.R. § 1614.302(a)(1).

Upon completion of the investigation into Petitioner's EEO complaint, the Agency advised Petitioner that a final decision on claims 2 and 3 would be issued without a hearing, pursuant to 29 C.F.R. § 1614.302(d)(2), and provided Petitioner notice of his right to request a hearing before an EEOC Administrative Judge (AJ) on claim 1, pursuant to 29 C.F.R. § 1614.108(f).<sup>3</sup>

On August 28, 2024, the Agency issued a final decision on claims 2 and 3 finding that Petitioner was not discriminated against as alleged. The final Agency decision provided Petitioner appeal rights to the MSPB. Petitioner then filed an appeal of the Agency's decision with the MSPB. An MSPB AJ docketed the two claims separately<sup>4</sup> and, on November 7, 2024, issued two Initial Decisions dismissing Petitioner's appeal for lack of jurisdiction. Regarding Petitioner's alleged involuntary retirement (MSPB No. DE-0752-24-0419-I-1), the MSPB AJ found that Petitioner failed to make nonfrivolous allegations that he lacked a meaningful choice when he decided to retire. Regarding the denial of Petitioner's WIGI (MSPB No. DE-531D-24-0418-I-1), the MSPB AJ found, in relevant part, that Petitioner failed to nonfrivolously allege Board jurisdiction over a direct appeal of the Agency's decision denying a WIGI. The MSPB AJ determined that Petitioner did not request reconsideration with the Agency of the denial of the WIGI, which was required for Board jurisdiction.

The MSPB AJ's Initial Decisions became final on December 12, 2024, after which Petitioner filed the instant petition.

### CONTENTIONS IN PETITION

About 12 days after Petitioner filed the instant petition, he submitted a brief arguing that the two claims before the MSPB did not capture "the full context" of his experience at the Agency that caused him to resign. He also mentions that a pending prior EEO complaint and the non-mixed claim from the instant complaint relate to his discrimination claims. He further argues the merits of his claims.

The Agency has not submitted a statement regarding the petition.

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<sup>3</sup> We note that Petitioner initially requested a hearing before an EEOC AJ on claim 1, but Petitioner subsequently withdrew his hearing request (Hearing No. 540-2024-00269X) and requested a final decision from the Agency on that non-mixed claim.

<sup>4</sup> The MSPB AJ did so because the Board's jurisdiction over claims 2 and 3 fell under separate statutory authorities, and the analysis would be different for each claim.

### ANALYSIS

EEOC Regulations provide that the Commission has jurisdiction over mixed case appeals and complaints on which the MSPB has issued a decision that makes determinations on allegations of discrimination. 29 C.F.R. § 1614.303 et seq. However, when the MSPB, as it did here, denies jurisdiction, the Commission has held that there is little point in continuing to view the matter as a "mixed case" as defined by 29 C.F.R. § 1614.302(a), because the MSPB did not address any matters within the Commission's jurisdiction. Therefore, the Commission finds that it has no jurisdiction to review Petitioner's petition. This matter will be considered a "non-mixed" case and processed accordingly. See generally Schmitt v. Dept. of Transportation, EEOC Appeal No. 01902126 (July 9, 1990); Phillips v. Dept. of the Army, EEOC Request No. 05900883 (October 12, 1990); 29 C.F.R. § 1614.302(c)(2)(i) and (ii).

We note that a petitioner is required to file any brief in support of a petition concurrently with the petition. See 29 C.F.R. § 1614.304(b)(3). Petitioner's brief is therefore untimely and not considered herein. Even if we were to consider it, however, it would not alter the outcome in this case.

### CONCLUSION

In accordance with these principles, consideration of Petitioner's petition for review is DENIED, and Petition No. 2025001150 is hereby closed. MSPB Nos. DE-0752-24-0419-I-1 and DE-531D-24-0418-I-1 are referred to the Agency for further processing as outlined herein.

### NOTICE TO THE PARTIES

Petitioner is advised by operation of 29 C.F.R. § 1614.302(b) that the Agency, if it has not already done so, is required to process his allegations of discrimination. Because Petitioner filed a mixed case complaint with the Agency, the Agency, pursuant to 29 C.F.R. § 1614.108(f), shall, within 30 days of its receipt of this decision, notify Petitioner of the right to elect between a hearing before an EEOC Administrative Judge or an immediate final decision on his discrimination claims pursuant to 29 C.F.R. § 1614.110.


PETITIONER'S RIGHT TO FILE A CIVIL ACTION (W0124)

This decision of the Commission is final, and there is no further right of administrative appeal from the Commission's decision. You have the right to file a civil action in an appropriate United States District Court, based on the decision of the Merit Systems Protection Board, **within thirty (30) calendar days** of the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by their full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work.

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:

  
Carlton M. Hadden, Director  
Office of Federal Operations

January 15, 2025  
Date